88-1875

No.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STEVEN CATALANOTTE,

Petitioner,

vs.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Questions presented

1. Whether due process is violated by the use of an conviction which is unconstitutional under existing law to enhance a sentence for a later offense where the earlier conviction was unconstitutional when it was obtained.

2. Whether due process is violated by application of principles of retroactivity to hold that conviction which is unconstitutional under existing law can be used to enhance a sentence for a later offense.

PARTIES INVOLVED [per Rule 21.1 (b)]

Petitioner, Steven Catalanotte, was the defendant in the Supreme Court of Kings County of the State of New York, appellant in the Second Department of the Appellate Division of the Supreme Court of the State of New York and appellant in the Court of Appeals of the State of New York. Respondent, People of the State of New York was the plaintiff in the Supreme Court of Kings County, State of New York, respondent in the Second Department of the Appellate Division of the Supreme Court of the State of New York and respondent in the Court of Appeals of the State of New York.

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1. Due process was denied by enhancement of the defendant's sentence of uncarceration of a later offense based upon the use of an earlier unconstitutional conviction and is contrary to the opinion of the United States Supreme Court in Burgett v. Texas,389 U.S. 109.

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Petitioner, Steven Catalanotte (hereafter, defendant), prays that a writ of certiorari issue to review the decision of the court of appeals of the State of New York, affirming his sentence as a second felony defender pursuant to section 400.21 and 70.06 of the New York Criminal Procedure Law.

JUDGMENT, OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals of the State of New York affirming the decision of the Second Department of the Appellate Division of the State of New York set out as appendix A. The denial of leave to reargue in the Court of Appeals of the State of New York is set out as Appendix B. The opinion of the Second Department of the State of New York, affirming the trial court decision is set out as Appendix C. The sentence minutes of the New York State Supreme Court, Kings County indictment number 5265/81 dated May 22, 1986 is set out as Appendix D. The statement of predicated felony filed in the New York State Supreme Court, Kings County under indictment number 5265/81, dated May 19, 1986 is set out as Appendix E.

Jurisdictional Statement

On December 15, 1988, the Court of Appeals of the State of New York filed its opinion, affirming the decision of the appellate Division, Second Department of the New York State Supreme Court. On February 16, 1989 the Court of Appeals of the State of New York denied a timely motion to reargue. Jurisdiction is invoked under 28 U.S.C. 1257 (3) and Rules 20.1 and 29 of this Court.

Constitutional Provisions

AMENDMENT [V]

No person shall... be deprived of... liberty...without due process of law...

AMENDMENT [XIV]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall ... deprive any person of ... liberty, without due process of law ...

STATEMENT OF THE CASE

NATURE OF THE CASE

Defendent Steven Catalanotte, entered a plea of guilty to robbery in the second degree (unarmed) under New York Supreme Court, Kings County, indictment number 5265/81 and sentenced the defendant, as a second felony offender to the New York State Department of corrections to an indeterminate sentence of 2 to 4 years. The trial court denied the timely application to find that the defendant was not a second felony offender based upon a first conviction which was

unconstitutional. Pursuant to statute under New York law, an unconstitutional conviction must not be counted towards a finding that a defendant is a second felony offender. The trial court found that the defendant was collaterally stopped from challenging the constitutionality of the first conviction under New York Supreme Court, Kings County indictment number 577/71 because it had been affirmed on appeal. In contending that defendant should not be subject to enhanced incarceration as a second felony offender, the defendant relied upon section 400.21 (7) (b) of the New York State Criminal

Procedure Law, which provides that a conviction obtained in violation of the Constitution of the United States must not be counted towards a finding that a defendant as a second felony offender.

On appeal, the Second Department of the Appellate Division of the New York State Supreme Court did not dispute that the defendant's first conviction was in violation of his constitutional right to a public trial, citing People v Jones, 47 NY2d 409, Cert. denied 444 U.S. 946. This constitutional requirement was enacted after the defendant's conviction had become final.

The new rule held that the summary closing of the courtroom during the testimony of an undercover officer was held to be unconstitutional and reversible error per se. This court held, however, that the defendant was not entitled to the subsequent change in the law because his judgment had become final prior to the new constitutional rule of criminal procedure which was enacted in the Jones decision. Thus, the court held that the defendant could not have the new rule of constitutional law retroactively applied to him.

Thereafter, leave was granted to

the New York Court of Appeals. In a sharply divided opinion, the highest court in the state held by a 4 to 3 vote that the conviction was obtained by means which, if the indictment were tried now, would violate the defendant's rights under the sixth amendment of the United States Constitution as presently appplied by the courts. The majority, however, held that a prior conviction is counted for purposes of a predicate felony finding if it was not in violation of the defendant's rights as defined by the law at the time it was obtained. Thus, the court held the defendant was not entitled

to a benefit of the present law. The majority did concede that a conviction obtained in violation of one's constitutional rights may not be used to enhance punishment for a later offense, citing Burgett v. Texas, 389 U.S. 109, 115.

In support of its holding, the majority relied in the language of the Section 400.21 of the New York State Criminal Procedure Law, (hereafter "CPL") which provides:

> A previous conviction in this or in any other jurisdiction which was obtained in violation of the rights of the applicable provisions of the constitution of the United States must not be counted in determining whether the defendant has been subjected

> to a predicate felony conviction. The defendant may, at any time during the hearing hereunder, controvert an allegation with respect to such conviction in the statement on the grounds that the conviction was unconstitutionally obtained.

In its decision, the majority held that the language of section 400.21 indicates that the validily of the conviction shall be determined as of the time it was entered or by subsequent law applicable to the judgment under principles of retroactivity. The court also held that the defendant was not entitled to a retroactive application of the present rule of constitutional law.

In sharp contrast, the dissenting opinion, declared that Criminal Procedure Law section 400.21 (7)(b) requires that a conviction obtained in violation of a

defendants constitutional rights "must not be counted" and that the statute gives a defendant the right to challenge the constitutionality of a prior conviction during the course of the second felony hearing. The court held that a flawed conviction should not, in fairness, be used a new as a basis for another period of incarceration. In summary, the dissent opposed new use of the infirm conviction to add to the defendant's term of imprisonment for a later conviction since it was in contravention of the legistative intention of 400.21 (7)(b).

STATEMENT OF FACTS

The trial court found that the defendant was a second felony offender upon his plea of guilty in New York Supreme Court, Kings County Indictment 5265/1981. As a predicate felon, the defendant was sentenced to a an indeterminate period of incarceration of 2 to 4 years. This is the minimum sentence allowable for a plea of a D felony for a second felony offender under New York State law. If the defendant was not a predicate felon, he could have been subjected to sentencing he could guidelines which start at a minimum of 1 day imprisonment. This finding was based upon an earlier felony conviction, after trial, under New York Supreme Court, Kings County indictment number

771/1971. The sentencing court held the defendant was collaterally estopped from challenging the validity of the earlier conviction because it had been affirmed by the Second Department of the Appellate Division. The defendant contended that his first conviction was unconstitutional under existing law.

In the earlier conviction, the trial court concluded the defendant was collaterally estopped from challenging the predicate felony finding because his first conviction had been affirmed on appeal prior to the states recognition of this new constitutional rule. The trial court stated that he was giving the defendant the minimum sentence under

the law and that it would give him a lighter sentence if the appellate court ruled that he was not a second felony offender. The defendant timely objected, relying upon section 400.21 (7)(b) of the New York Criminal Procedure Law which provides that a previous conviction obtained in violation of the constitution of the United States must not be counted in determining whether the defendant is to be subjected to the enhanced sentencing guidelines as a predicate felony offender. In support of its position, the defendant relied of the decision by the court appeals in People v. Jones, 47 N.Y. 2d 409, cert. denied, 444 U.S. 192 whereby it was declared that a conviction is unconstitutional

if the courtroom is summarily closed during the testimoney of an undercover officer. See also People v Cuevas, 50 N.Y.2d 1022. Similarly, there is no dispute that the trial court summarily closed the courtroom during the testimony of an undercover officer during this defendant's trial. This is clearly unconstitional under existing law.

The defendant was convicted, after trial, under indictment number 771/1971 and was sentenced to 10 years imprisonment. Now the People seek to enhance the sentence on his conviction under indictment 5265/1981 based on the earlier unconstitional conviction.

REASONS FOR GRANTING CERTIORARI

1.

DUE PROCESS WAS DENIED BY ECHANCEMENT OF THE DEFENDANT'S SENTENCE OF INCARCERATION OF A LATER OFFENSE BASED UPON THE USE OF AN EARLIER UNCONSTITUTIONAL CONVICTION AND IS CONTRARY TO THE OPINION OF THE UNITED STATES SUPREME COURT IN Burgett v. Texas, 389 U.S. 109

The defendant was sentenced to an enhanced period of incarceration for a later conviction based upon a conviction which is unconstitutional under existing law. The highest appellate court, in a 4 to 3 decision, held that a conviction in violation of the sixth amendment of the United States could be used to increase the sentence of the defendant. In support of its decision, the court held that while the defendant's

earlier conviction is unconstitutional under existing law, the conviction can be used because it was constitutional at the time it was obtained.

It is submitted that the constitutionality of a conviction is to be examined at the time that it is used to seek enhancement of a sentence. To be allowed to use an infirm conviction to increase a sentence in a later case denies this defendant of due process.

This is to be distinguished from a situation where a defendant seeks to reverse an earlier conviction on the grounds that is unconstitutional. This defendant only seeks to prevent enhanced punishment of a later offense. Burgett v. Texas, 389 U.S.

109,115. An unconstitutional conviction must not be available for later use even if the constitutional principle is not realized until after a defendant's appeal becomes final.

In Burgett, that defendant was given the benefit of a recently enacted constitutional principle set forth in Gideon v. Wainwright and this Court held that a conviction which is unconstitutional under existing law should not be counted to enhance this sentence. This defendant seeks the benefit of the Burgett rule to his case.

The doctrine of retroactivity should not be a basis to prevent the defendant's challenge to the use of an unconstitutional conviction. This case is strikingly different from the retroactivity cases which are used as a standard to set aside a conviction. See United States v. Johnson, 457 U.S. 537, 542; Griffith v. Kentucky, 479 U.S. 314.

This defendant's point is different: he seeks only to avoid new use of the 1971 conviction that would be unconstitutional now -- to enlarge the term of imprisonment that will be imposed on him now. None of the retroactivity cases addressed by the United States Supreme Court deal with this situation. And none of them deal with a statute that on its face provides that the constitutionality of prior convictions -final judgments for all other purposes can be challenged today. Thus, the retroactivity cases are not precedents for the decision to increase this defendant's sentence.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOSEPH R. GIARAMITA, JR.
Attorney for Petitioner

STATE OF NEW YORK
COURT OF APPEALS

No. 310

The People & c.,
Respondent,
v.

Steven Catalanotte,
a/k/a Steven Catalonotte,
Appellant.

OPINION

This opinion is uncorrected and subject to revision before publications in the New York Reports.

Joseph Giaramita, Jr. , Brooklyn, for appellant.

Elizabeth Holtzman, D.A., Kings County (Darrel B Fields, Barbara D. Underwood, Schulamit Rosenblum of counsel) for respondent.

SIMONS, J.

The question presented on this appeal is whether defendant's sentence as a second felony offender may be predicated upon a 1971 conviction which satisfied constitutional standards when obtained and has survived post conviction collateral attack, but was obtained by means which, if the indictment were tried now, would violate defendant's rights under the sixth amendment of the United States Constitution as presently applied by the courts. Defendant asserts that the prior conviction may not be used to enhance his sentence because in obtaining it the trial court followed a practice of closing

the courtroom which this Court subsequently recognized as unconstitutional. We disagree: for purposes of determining whether prior conviction "was unconstitutionally obtained" (CPL 400.21 [7] [b]) and thus may not be counted for predicate felony purposes - the proper inquiry is to determine whether the conviction was obtained in violation of the defendant's rights as defined by the law at the time of the conviction or by present law which is properly applied to it under recognized principles of retroactivity.

On March 5, 1971 defendant, then a New York City police officer,

sold fifty packets of heroin to an undercover police officer. He was arrested six days later, possessing heroin and methadone, and subsequently convicted of various drug related felonies arising from the two incidents. During trial, the People called as a witness the undercover officer who made the "buy" from defendant. Before the officer testified, the prosecutor requested that the court take judicial notice of the hazards to which testifying undercover officers are generally subject and requested that spectators be excluded. The trial court summarily closed the courtroom to the public

before the officer testified. Defendant appealed his conviction, contending that it had been obtained in violation of his constitutional right to a public trial. His claim was rejected by both the Appellate Division (41 A.D.2d 968) and this court (36 N.Y.2d 192).

Four years later we declared for the first time that the summary closing of a courtroom simply because a witness is an undercover police officer constitutes reversible error (People v. Jones, 47 N.Y.2d 409, cert denied 444 US 946). Deviation from the rule is justified, we said, only when preceded by an inquiry "careful

enough to assure the court that defendant's right to a public trial is not being sacrificed for less than compelling reasons." (id. at 414-415). There had been no such inquiry in defendant's case.

In 1986, defendant was convicted in this case on his guilty plea of attempted robbery in the second degree in satisfaction of an indictment charging him with several crimes for his participation in an armed robbery and subsequent gun battle with the police. He was sentenced as a second felony offender over his objection that the 1971 conviction, used as the predicate, was unconstitutionally

obtained under People v. Jones (47 NY 2d 409, supra). After sentencing, defendant moved pursuant to CPL 440.10 (2) (a) to vacate the 1971 conviction as unconstitutional, urging that the Jones rule should be applied retroactively. The court denied the petition and defendant did not appeal that ruling.

On this appeal, defendant pursues a different route to avoid being sentenced as a predicate felon. He now concedes that Jones should not be applied retroactively to vacate the 1971 conviction. Instead, he argues that the Jones rule should only be applied to prevent the

imposition of enhanced punishment for the 1986 conviction. The Appellate Division affirmed the judgment of conviction but, analyzing defendant's claim solely as whether the Jones rule should be applied retroactively and required vacatur of the 1971 conviction, did not address defendant's primary argument.

A conviction obtained in violation of one's constitutional rights may not be used to enhance punishment for a later offense (Burgett v Texas, 389 US 109, 115). CPLR 400.21 (7) (b) implements that principle. It provides in relevant part: A previous conviction in this or in

any other jurisdiction which was obtained in violation of the rights of the defendant under the applicable provisions of the constitution of the United States must not be counted in determining whether the defendant has been subjected to a predicate felony conviction. The defendant may, at any time during the hearing hereunder, controvert an allegation with respect to such conviction in the statement on the grounds that the conviction was unconstitutionally obtained (emphasis added).

The clear import of the phrases "was obtained" and "was unconstitutionally obtained" indicate

that the validity of the conviction shall be determined as of the time it was entered. An unconstitutional conviction is, by definition, a conviction which was obtained in violation of the defendant's constitutional rights, i.e., his rights as defined by the law existing at the time the conviction was obtained or by subsequent law applicable to the judgment under principles of retroactivity. The conviction does not become unconstitutional merely because the law has changed subsequent to the defendant's direct appeal of that conviction (Linkletter v. Walker, 381 US 618, 628 629; see also, United

States v. Johnson, 457 US 537, 542). Since the predicate felony statute operates upon the prior conviction rather than the prior practice, accepted principles of retroactivity must be applied to determine whether a conviction "was unconstitutionally obtained" and thus may not be counted when the People seek to impose an enhanced sentence. Under those rules, a defendant is entitled to the benefit of any change in the law if the change occurs before his conviction becomes final (see, Griffith v. Kentucky, 479 US 314, 107 S Ct 708, 716) or, if the right at stake is such that the law has engrafted an exception to the traditional rule to permit

collateral attack on judgments of conviction after they have become final (see, e.g., Robinson v. Neil, 409 US 505; [double jeopardy];Ashe v. Swenson, 397 US 436 [same]; Arsenault v. Massachusetts, 393 US 5 [right to counsel at a preliminary hearing]; McConnell v. Rhay, 393 US 293 [right to counsel at sentencing]; Roberts v. Russell, 392 Us 293 [right to confrontation]; Jackson v. Denno, 378 Us 368 [right to pretrial determination of the voluntariness of a confession]).

Defendant's 1971 conviction, which serves as the predicate for his present sentence, meets neither of these criteria. It was not "obtained in

violation of the rights of *** defendant" because the closure of the courtroom during his trial complied with the existing legal requirements for a public trial (see, People v Hinton, 31 N.Y.2d 71, cert denied 396 Us 886; People v Jeckle, 308 NY 56). We so held on defendant's direct appeal (People v Catalanotte, 36 N.Y.2d 192, affg 41 A.D.2d 968). That we subsequently declared a similar procedure unconstitutional in People v Jones (47 N.Y.2d 409, supra) does not, as defendant concedes, make the Jones rule retroactive to prior convictions plain language of the statute, require a finding that the

predicate conviction "was unconstitutionally obtained".

The logic of such an interpretation is manifest when one considers that the proper meaning to be given to broadly stated constitutional commands, such as due process of law and right to a public trial, changes constantly. To apply such changes retroactively when the court has not declared them retroactive, may open to question hundreds of convictions and enhanced sentences based upon them (see, e.g., Batson v Kentucky, 476 US 79 [racial bias in jury selection]; Payton v New York, 445 US 573 [warrantless felony arrest]

(Linkletter v Walker, 381 US 618, 628-629; see also, United States v Johnson, 457 US 537, 542). Since the predicate felony statute operates upon the prior conviction rather than the prior practice, accepted principles of retroactivity must be applied to determine whether a conviction "was unconstitutionally obtained" and thus may not be counted when the People seek to impose an enhanced sentence. Under those rules, a defendant is entitled to the benefit of any change in the law if the change occurs before his conviction becomes final (see, Griffith v Kentucky, 479 US 314, _____, 107 S Ct 708, 716) or, if the right at stake is such that the law has engrafted an exception to the traditional rule to permit collateral attack on judgments of conviction after they have

become final (see, e.g., Robinson v Neil, 409 US 505; [double jeopardy]; Ashe v Swenson, 397 US 436 [same]; Arsenault v Massachusetts, 393 US 5 [right to counsel at a preliminary hearing]; McConnell v Rhay, 393 [right to pretrial determination of the voluntariness of a confession]).

Defendant's 1971 conviction, which serves as the predicate for his present sentence, meets neither of these criteria. It was not "obtained in violation of the rights of *** defendant" because the closure of the courtroom during his trial (see, People v Hinton, 31 N.Y.2d 71, cert denied 410 US 911; People v Hogan, 24 N.Y.2d 395, cert denied 396 US 886; People v Jeckle, 308 NY 56). We so held on defendant's direct appeal (People v Catalanotte, 36 N.Y.2d 192,

affg 41 A.D.2d 968). That we subsequently declared a similar procedure unconstitutional in People v Jones (47 N.Y.2d 409, supra) does not, as defendant concedes, make the Jones rule retroactive to prior convictions that have survived direct appeal, nor does it, in view of the plain language of the statute, require a finding that the predicate conviction "was unconstitutionally obtained".

The logic of such an interpretation is manifest when one considers that the proper meaning to be given to broadly stated constitutional commands, such as due process of law and right to a public trial, changes constantly. To apply such changes retroactively when the court has not declared them retroactive, may open to question hundreds of convictions and enhanced sentences based upon them (see, e.g., Batson v Kentuky,

476 US 79 [racial bias in jury selection]; Payton v New York, 445 US 573 [warrantless felony arrest in home]; Sandstromv Montana, 442 US 510 [improper jury charge]; Griffin v California, 380 US 609 [comment by prosecutor or judge upon defendant's failure to testify]). The dissent assumes such convictions and others like them were unconstitutionally obtained even though they concededly cannot be vacated in post-conviction proceedings. It holds that no matter how drastically the law has modified between the time of the first conviction and the second, any change renders the first conviction unconstitutional for the purpose of enhanced sentencing. Its rule would invalidate the conviction for such purpose

even if the infirmity was not challenged at the time of the first conviction because under current law, if the predicate conviction "was unconstitutionally obtained", the defendant does not have to raise the constitutional deprivation on direct appeal from the first conviction(see, People v Harris, 61 N.Y.2d 9, 16; People v Wright, 119 A.D.2d 973). A defendant would not be required to anticipate a future change in the law as did the defendant in this case. For example, and using the illustration cited above, under the dissent's view, past convictions obtained by a jury selected along racial lines would be open to question, at least for enhanced sentencing purposes, even though constitutional rules in effect at the time were followed by the trial court

(compare Swain v Alabama, 380 US 202 and People v McCray, 57 N.Y.2d 542 with Batson v Kentucky, 476 US 79, supra). Similarly, convictions obtained through the use of confessions or real evidence properly obtained under existing law, but now open to question in view of Payton, supra, and convictions obtained after trials in which Sandstrom charges were given would be nullified for enhanced sentencing purposes, regardless of whether defendant objected at trial. The statute does not require this result, nothing indicates the Legislature intended it and there are no policy reasons for ordering it.

Finally, we note that People v Love (71 N.Y.2d 711), relied upon by the defendant and the dissent, is clearly distinguishable.

In that case the defendant's prior conviction was vacated because it was obtained in violation of his constitutional rights under the law that existed at the time of the conviction. Here, defendant's constitutional rights, as then defined, were respected in full.

Accordingly, the order of the Appellate Division, insofar as appealed from, should be affirmed.

People v Steven Catalanotte

Kaye, J. (dissenting):

CPL 400.21(7)(b) declares that a previous conviction obtained in violation of a defendant's federal constitutional rights "must not be counted" in determining second felony offender status. To that end, the statute gives a defendant the right to first challenge the unconstitutionality of a prior conviction at any time during the course of the second felony hearing. The statute bespeaks a legislative intention that--while a prior unconstitutional conviction may not be undone, indeed a defendant may already have served a lengthy term of imprisonment--that flawed conviction should not, in fairness, be used a new as the basis for another period of incarceration. (For those

found to be second felony offenders, the minimum and maximum sentences are materially increased. [See, Penal Law § 70.06].)

This case fits the statute in letter and spirit. In 1971, defendant was convicted of various drug offenses under circumstances the majority concedes would compel reversal as a matter of federal constitutional law were he tried today. Despite his diligent efforts to litigate the constitutional issue, the courts recognized the merit of his claim only four years later in an unrelated case, after defendant had exhausted his avenues of appeal. Now the People seek to make new use of the 1971 conviction to add to defendant's term of imprisonment for a 1986 robbery conviction. To my mind, CPL 400.21(7)(b) proscribes this use of the

earlier conviction, and I therefore respectfully dissent.

In concluding that defendant may be subjected to increased imprisonment based on the 1971 conviction, the majority reads restrictions into the plain language of the statute that are simply not there.

The Court holds that the statute's use of past tense-prohibiting use of a conviction that "was obtained" or "was unconstitutionally obtained"--signals a legislative direction that the validity of the conviction is to be determined "as of the time it was entered." (Slip on p 4.) In that the statute deals with past convictions, use of the past tense is inevitable. Nothing in the statute limits its application to convictions that were

obtained in violation of defendant's rights as courts were willing to recognize them at the moment of conviction, nor does the statute call for application of retroactivity principles. Had the Legislature intended to so confine the statute, it could have and undoubtedly would have said so.

The Court's analysis, like that of the Appellate Division, proceeds on the promise that the issue is solely a question of retroactivity. But it should be immediately apparent that this case is strikingly different from the retroactivity cases (see, slip on, p 5). Defendant is not seeking to apply People v Jones (47 N.Y.2d 409) retroactively to nullify his 1971 conviction. Vacatur of that conviction was denied in his separate post-sentencing

proceeding pursuant to CPL 440.10. He took no appeal from that decision, served his sentence, and concedes that the constitutional deprivation cannot be remedied retroactively by overturning the conviction. His point is different: he seeks only to avoid new use of the 1971 conviction--that would be unconstitutional now--to enlarge the term of imprisonment that will be imposed on him now. None of the cited cases deal with this situation. And none of them deal with a statute that on its face provides that the constitutional point had never been raised during the prior litigation. Thus, the cited retroactivity cases are not precedents for the Court's decision under CPL 400.21(7)(b).

Nor are the retroactivity cases--even if applicable in theory dispositive of the

issues before us. While the Supreme Court's jurisprudence on retroactivity has evolved considerably over time, it is plain that the doctrine is founded on nothing more that fairness and practicality (see generally, Griffith v Kentucky, 479 US 314; Linkletter v Walker, 381 US 618). The decision to give a newly announced constitutional rule only prospective effect is distinctly not founded on any perception that previous failures were not also deprivations of a federal constitutional right. If the law in effect at the time of a conviction were dispositive on constitutionality, as suggested by the majority (slip on at 4-5), there would be no reason to apply a newly announced decision to convictions in other cases pending on appeal. Thus, whether or not People v Jones

(supra) is retroactive, it is true today that defendant's 1971 conviction was actually obtained in violation of his rights under the federal Constitution, and the case falls squarely within the prohibition of CPL 400.21(7)(b) against renewed use of such convictions.

Accordingly, our recent decision in People v Love (71 N.Y.2d 711) is not "clearly distinguishable," as the majority claims (slip on at 7). While it is true that the constitutional violation suffered by the defendant in that case was a denial of the right to counsel--a violation recognized even under the law in effect at the time of the conviction-that happenstance was not critical to our decision. Rather, the

decision was based on our interpretation of CPL 400.21(7)(b) as intending a broad mandate that "a person convicted of a crime should not be treated as a repeat offender... simply because in the last 10 years he was unconstitutionally convicted and deprived of his liberty" (Id. at 717).*

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*Significantly, the use sought to be made of the unconstitutionally obtained conviction in Love was indirect: the People sought to use not the unconstitutional conviction itself, but the time period during which Love was incarcerated pursuant to that conviction to toll the running of a 10-year limitation period under Penal Law § 70.06(1)(b)(iv) so that an earlier, concededly constitutional conviction might be counted as a predicate felony. Notwithstanding the People's claim that there was no constitutional impediment to such a use of the unconstitutional conviction, we held that CPL 400.21(7)(b) prohibited even that indirect use. The majority's decision today--which, under the same statutory language, countenances a direct use of an unconstitutionally obtained conviction to increase defendant's punishment--is completely at odds with Love.

It is clear that, in engrafting the new restrictions onto CPL 400.21(7)(b), the Court's real concern is simply the perceived practical impact of enforcing the statute as written. Without the restrictions now imposed by the Court, the majority fears that "hundreds of convictions and enhanced sentences based upon them" may be "open to question" (slip opn at 6). Such a concern begs the question of what the Legislature intended; if the costs of the statutory prohibition are high, that is a determination for the Legislature to make, not the Court. But it is also a misplaced concern. Since CPL 400.21(7)(b) applies only to second felony offender determinations, a proper and fair leading of its statute does not open any convictions to question. And since the

statute itself provides that claims of unconstitutionality with respect to prior convictions are waived if not asserted at the predicate felony hearing, it is equally clear that enhanced sentences would not now be generally thrown open to question.

The vast majority of convictions are obtained under circumstances that are accepted as constitutional both at the time of conviction and at subsequent predicate felony proceedings. In those instances where a defendant is able to overcome the considerable burden of proof and succeed in establishing that the prosecution had actually exercised its peremptory challenges in a racially discriminatory fashion (Batson v Kentucky, 476 US 79)--to use the majority's own example (slip opn at 7)--such a conviction should not now be given new vitality as the

basis for additional punishment. CPL 400.21(7)(b) so provides.

* * * * * * * * * * *

Order insofar as appealed from affirmed. Opinion by Judge Simons in which Chief Judge Wachtler and Judges Alexander and Bellacosa concur. Judge Kaye dissents and votes to reverse in an opinion in which Judges Titone and Hancock concur.

Decided December 15, 1988

Mo. No. 33

Motion for reargument denied.

The People &c.,
Respondent,
v.

Steven Catalanotte,
Appellant.

DECISION
COURT OF APPEALS

FEBRUARY 16,1989

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

App.3

2076p
Z/eb

A.D.2d

Argued
- May 28,1987

MILTON MOLLEN. P.J.
RICHARD A. BROWN
ISAAC RUBIN
JOSEPH J. JUNZEMAN, JJ.

743E

The People, etc., respondent,
v Steven Catalanotte a/k/a
Steven Catalanotte, appellate.
(Ind. No. 5265/81)

DECISION
& ORDER

Joseph R. Giaramita, Jr.. Brooklyn N.Y.. for appellant.

Elizabeth Holtzman. District Attorney. Brooklyn, N.Y. (Barbara D. Underwood. Darrell B. Fields and Catherine A. Keane of counsel). for respondent.

Appeal by the defendant from a judgment of the Supreme Court. Kings County (Owens.J.), rendered May 22, 1986. convicting

him of attempted robbery in the second degree, upon his plea of guilty, and imposing sentence.

ORDERED that the Judgment is affirmed, and the matter is remitted to the Supreme Court. Kings County, for further proceedings pursuant to CPL 460.50(5).

The defendant contends that the court erroneously adjudicated and sentenced him as a second felony offender because his 1971 predicate felony conviction was obtained in violations of his constitutional right to a public trial. In the 1971 case, the trial court summarily closed the courtroom during the testimony of an undercover officer after a request from the prosecutor to take judicial notice of the jeopardy such agents are subjected to by reason of their occupation. On the defendant's direct appeal from the 1971 judgment of conviction, that issue was raised and rejected, on the merits, by majority of this court (see, People v Catalanotte, 41 A.D.2d 968) and by the Court of Appeals (see, People v Catalanotte, 36 NY 2d 192). Subsequently, in People v Jones (47 N.Y.2d 409, cert denied 444 US 946), the Court of Appeals held that it was reversible error to summarily close the courtroom

While the Court of Appeals in People v Jones (47 N.Y.2d 409, supra) did not announce an entirely new and unanticipated principle of law (see. People v Boyd. 59 A.D.2d 558: People v Castro. 63 A.D.2d 891), it did resolve a previously unsettled point of law (see, e.g. People v Garcia. 51 A.D.2d, affd 41 N.Y.2d 861) pertaining to "the methodology by which a court was to go about the business of determining whether the facts underlying the [closure] application fell within the standards enunciated in the cases [construcing the right to a public trial]" (People v Jones, supra, at 414). Consequently, the Jones rule falls within the middle of two extreme categories: it is neither a decision which merely explicates settled precedents to new and different factual situations, nor is the decision a clear break with the past. Since the Jones rule falls within an intermediated position, retroactivity is more appropriately restricted to cases still on review of case law discloses that appellate courts have applied the commonlaw doctrine of retroactivity and have given the Jones rule retroactive application to all cases on direct review at the time Jones was decided (see, People v Brown, 79 A.D.2d 659: People v Gonzalez, 74 A.D.2d 928: People v Cousart, 74 A.D.2d 877: People v McNamee, 71 A.D.2d 559). However, we cannot say that the Jones rule had such a fundamental impact on the integrity of the fact finding process as to compel complete retroactivity. Absent

manifest injustice, the defendant is not entitled to benefit from the change in the law (see, People v Pepper, 53 N.Y.2d 213 cert denied 454 US 967). Accordingly, the sentencing court properly adjudicated and sentenced the defendant as a second felony offender (cf., Burgett v Texas, 389 US 109. 114).

MOLLEN. P.J., BROWN, RUBIN and KUNZEMAN, JJ., concur

ENTER:

MARTIN H. BROWNSTEIN Clerk

February 16, 1988 743E

PEOPLE v CATALANOTTE, STEVEN
A/K/A CATALONOTTE, STEVEN

SUPREME COURT:STATE OF NEW YORK
COUNTY OF KINGS:CRIMINAL TERM:PART 38

X

THE PEOPLE OF THE STATE OF NEW YORK

Ind.#
-against- 5265/81

STEVE CATALANOTTE Att.
Rob.2

Defendant. Sentence

X

360 Adams Street
Brooklyn, N.Y.
May 22,1986

B e f o r e :

HONORABLE THADDEUS E. OWENS,

Justice

A p p e a r a n c e s :

ELIZABETH HOLTZMAN,ESQ.
District Attorney,
Kings County
BY: JONATHAN FAIRBANKS,ESQ.
Assistant District Attorney

JOSEPH GIARAMITA,JR.,ESQ.
2775 East 12th Street
Brooklyn, New York
NEW ADDRESS:
1797 Stillwell Ave.
Brooklyn, N.Y. 11223

Herman Nyrin
Official Court Reporter

MR. GIARAMITA: First, I would like to acknowledge receiptment of the Predicate Felony Statement pursuant to 400.15, 400.16 and 400.21.

THE CLERK: Does he admit the conviction as stated in the predicate felony statement, does he deny it or does he stand mute?

MR. GIARAMITA: He admits it, but he contests the Constitutionality of that first conviction.

THE CLERK: That was after a trial. Any Constitutional infringement that may have been committed would have to be resolved by an appellate court.

MR. GIARAMITA: He did address an issue on appeal from the 1971 conviction. The

conviction was affirmed by the Appellate Division. And his honor indicated to me that his position was a collateral estoppel as to that indictment.

Nevertheless, we take issue with that, and for purposes of a record, under 400.21, my client maintains that his trial was unconstitutional in that it was not public trial under People versus Jones, 47NY2d.

And also maintains that he is not a predicate felon under 70.06, in that the Predicate Felony Statue of 70.06 was enacted in September of 1973, and it says under Section 33 of Chapter 276 of the Regular Sessions Laws of New York do not apply to or govern the construction and punishment for any offense committed prior to the effective date of this Act. "This" Act being September, 1973. Or the construction and

application of any offense must be construed and punishment must be accorded according to the provisions of the law existing at the time of the commission thereof in the same manner as if this Act had not been enacted.

Therefore, we are submitting that the intent of Legislature was not to include a 1971 conviction under the law that was enacted in 1973.

Your Honor, I went to the Appellate Division and I called up Jonathan Fairbanks and indicated that I was going to make a bail application. However, I want to bring to your Honor's attention that under 530.35, when you do a bail application after conviction but before sentence, there is no provision in the CPL that allows for bail

application until sentence has been imposed by the Court. The only time you can make a bail application is before sentence is imposed or when bail has been revoked and a greater bail has been imposed on the defendant.

That doesn't seem proper that if you keep the bail conditions the same, then my client cannot make that same bail application, and our application for bail was rejected. I have an Order to Show Cause that I am going to give to the Appellate Division right now.

THE COURT: It was rejected for the simple reason that there was nothing in front of the Appellate Division on which it could act. The Appellate Division could only act if a sentence had already been imposed. Then you can make an application before the

Appellate Division to permit him to remain out on bail pending an appeal.

MR. GIARAMITA: I have that right in front of me. For the purpose of his job and in light of the caselaw that indicates he should be given bail. And I am asking that we be able to go right now to the Appellate Division and make this application.

THE COURT: I will have to remand him until then.

MR. GIARAMITA: That's within you Honor's discretion under 530.35.

THE COURT: I have no discretion, I must remand him now.

Off the record.

(Off-the-record discussion.)

MR. GIARAMITA: I move to dismiss the three counts of robbery in the first degree.

MR. FAIRBANKS: No obligation.

THE COURT: Granted.

MR. FAIRBANKS: The reason for doing that is because of the plea negotiations in this case and because it is the People's position that the plea to the Attempted Robbery in 2d Degree covers this entire indictment.

However, should this case be reversed or remanded to this Court, it is the People's position that he can be tried on the Robbery in the First Degree.

THE COURT: And that the Robbery in the First Degree would be reinstated?

MR. FAIRBANKS: Yes.

THE CLERK: Also, two counts of criminal use of a firearm in the first degree is a violation B Felony.

MR. FAIRBANKS: Under the same reasoning, the People would move to dismiss that also.

THE CLERK: Counselor, is there anything that you wish to say before sentence is pronounced?

MR. GIARAMITA: Yes.

THE COURT: The defendant is adjudicated a second felony offender.

MR. GIARAMITA: I take exception to his Honor's ruling, for the purpose of the record.

I am serving a copy of the Notice of Appeal on the Supreme Court today, and on The People of the sentence, but not the conviction on the sentence.

(recess)

THE CLERK: We are ready to pronounce sentence at this time.

THE COURT: Counselor, the minimum

sentence that I can give your client is two to four years under the law.

The defendant is sentenced to the New York State Department of Correctional Services for a minimum of two years, and a maximum of four years.

THE CLERK: You may appeal from this sentence just imposed upon you by filling a notice of appeal with the Clerk of this Court in duplicate within thirty days from this date.

A similar notice must be served upon the District Attorney of Kings County.

If you cannot afford to retain counsel for this purpose, you may write to the Appellate Division, 45 Monroe Place, Brooklyn, New York and they will provide an attorney

free of cost.

You have been adjudicated a second felony offender, and you have been sentenced to a minimum of two years and a maximum of four years to the New York State Department of Correctional Services.

THE COURT: If the Appellate Division rules that he is not a second felony offender, then I will give him a lighter sentence. I don't know what it will be, but it will be less than I have given him today.

CERTIFIED AN ACCURATE TRANSCRIPT

Norman Nyrin
Official Court Reporter

COUNTY OF KINGS: CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff,

-against-

STEVEN CATALANOTTE

Defendant.

Ind. No. 5265/81

STATEMENT PURSUANT TO CPL ARTICLE 400(CPL §§400.15 400.16 & 400.21)

PLEASE TAKE NOTICE that upon information presently available the District Attorney of the County of Kings hereby charges that the Defendant has previously been convicted of:

CRIME	PREDICATE VFC	DATE OF SENTENCE	INDICTMENT JURISDICT.	NUMBER
CSCS 3°	No	12/29/71	Kings County	577-71

Each conviction shown above which occurred within the State of New York is for a felony, and each such conviction which occurred in another jurisdiction is for an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this State.

Each conviction designated above as a "Predicate VFC" is a predicate violent felony conviction as defined in paragraph (b) of subdivision one of Penal Law §70.04.

In addition each sentence was imposed upon the defendant not more than ten years before Nov. 4, 1981, the date of the commission of the present felony except as indicated below.*

* Where sentence upon a prior Felony conviction has been imposed more than ten years before the commission of the present felony, the ten year statutory period has been extended by a total of years representing the period of time between the commission of both crimes during which defendant was incarcerated for any reason. More particularly, the defendant was incarcerated at:

INSTITUTION	COMMENCING	TERMINATING

Dated: Brooklyn, New York
May 19, 1986

ELIZABETH HOLTZMAN
DISTRICT ATTORNEY
BY: JONATHAN FAIRBANKS
ASSISTANT DISTRICT ATTORNEY

SC-136 1/83